NOTICE

The Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct Invites Comments on Proposed Revisions to Massachusetts Rule of Professional Conduct 1.13

The Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct ("Committee") invites comments on its proposal to revise Massachusetts Rule of Professional Conduct 1.13. The Committee welcomes all comments pertaining to the issues raised by its proposals, and will make recommendations to the Supreme Judicial Court after reviewing the comments submitted.

The Committee's proposed version of Massachusetts Rule of Professional Conduct Rule 1.13 is based on the current version of the American Bar Association's Model Rule 1.13. The explanations for these proposed changes from the model rule and the current rule follow the proposed rule, below.

The committee has recommended the adoption of revisions to Rule 1.13 and its comments that reflect the language of the current ABA model rule. In general, the committee believes that the current version of the model rule provides better guidance than the current form of our Rule 1.13 for lawyers representing organizations. In the interests of uniformity the committee's recommendation follows the text of the model rule and model comments.

The committee wishes to point out one issue that gave it some pause. Clauses (c) and (d) of the model rule create an additional exception to the confidentiality requirements of Rule 1.6 by permitting a lawyer to reveal information relating to a violation of law if the lawyer believes that the violation is reasonably certain to result in a substantial injury to the organization. In considering whether to recommend adoption of these clauses, the committee took into account the fact that the Massachusetts version of Rule 1.6, both the formulation of the confidentiality obligations and the exceptions to it, are somewhat different from the subsequently adopted ABA Model Rule 1.6. Our rule is more precise in its definition of confidentiality, and our exceptions are a little broader in some respects and a little narrower in others. Those differences led us to wonder about the coverage of the additional exception to the confidentiality principle in Rule 1.13(c), which permits the lawyer for an organization "to reveal information relating to the representation, whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization." The committee considered the possibility that the exceptions in our Rule 1.6 were sufficient to cover all situations to which Rule 1.13(c) and (d) might be thought to apply.

We have concluded, however, that we should recommend adoption of the Model Rule 1.13 in its entirety for several reasons. First, we cannot be sure that our present version of Rule 1.6 is sufficiently comprehensive. The language of Model Rule 1.13(c) – "whether or not Rule 1.6 permits such disclosure" – reflects the uncertainty of the drafters and their belief in the need for a catchall to cover unforeseen situations. One such area might well involve organizations that were not the focus of attention when our revision of Rule1.6 was adopted in 1998. A principal area of concern at that time was the prevention or rectification of harm to third

parties from corporate fraud. But Rule 1.13 applies to all forms of organizations, including municipal corporations. The drafters may well have thought, for example, that Rule 1.6's focus on fraud may not fit well the harm resulting to the public or to the shareholders of a corporation from various forms of corruption that might come to the attention of a lawyer or in which a lawyer's services might have been abused. Moreover, simply failing to adopt the recommended Rule 1.13(c) and (d) might send the unintended message that we did not intend to permit a lawyer to make disclosures under the circumstances described in Rule 1.13(c) even though many of such circumstances would also involve harm to others, the prevention of which could require disclosures permitted by Rule 1.6(b)(1).

The Supreme Judicial Court website has the following documents available for review: This notice; redlined copies of the Committee's proposed revisions to Rule 1.13 indicating how the Committee's proposal differs from American Bar Association Model Rule 1.13 and from current Massachusetts Rule 1.13.

Comments should be directed to The Standing Advisory Committee on the Rules of Professional Conduct, c/o Administrative Attorney Barbara Berenson, Supreme Judicial Court, John Adams Courthouse, One Pemberton Square, Boston MA 02108 on or before Tuesday, July 31, 2007. Comments may also be sent to: barbara.berenson@sjc.state.ma.us.

The Standing Advisory Committee's Proposed Rule 1.13

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Description of Revisions to Rule 1.13.

Paragraph (b) of the rule was revised to conform to paragraph (b) of the Model Rule. The drafters of the model rule rewrote and incorporated in Model Comment 4 some of the text that was deleted from paragraph (b).

Paragraphs (c), (d) and (e) are new and are taken from the corresponding paragraphs of Model Rule 1.13.

Paragraphs (f) and (g) are the corresponding paragraphs of the Model Rule. They replace similar provisions in paragraphs (d) and (e) of the current rule. Paragraph (f) differs from the corresponding provision of paragraph (d) of the current rule by providing that the actions contemplated by the paragraph would be taken when the lawyer knows or reasonably should know, rather than when it is apparent, that the organization's interests are adverse to those of the constituent. The change was adopted in the interest of uniformity with the model rules.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 9.1(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside

the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3, 4.1 or 8.3. Moreover, the lawyer may be subject to disclosure obligations imposed by law or court order as contemplated by Rule 1.6(b)(4). Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (4). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.6(b)(1) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal. Nothing in these rules

prohibits the lawyer from disclosing what the lawyer reasonably believes to be the basis for his or her discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [4]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such

an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Description of Revisions to the Comments.

Model Comments 1 and 2 are the same as the current Massachusetts comments so no change is recommended.

Proposed Comment 3 has been revised to correspond to the model comment, and Comment 4 is new and is the model comment. Together, they cover in somewhat revised language the guidance now in Rule 1.13(b) and Comment 3. The only revision from the model comments is the cross reference to the definition of the term "knows", which is located in Rule 9.1 in the current rules.

Proposed Comment 5 corresponds to Model Comment 5, and is a rewording of the current version of Comment 4.

Proposed Comment 6 has been modified to include a sentence referring to disclosures contemplated by Rule 1.6(b)(4), which is a reference to obligations that may be imposed by law. This refers to such laws as the provisions of the Sarbanes Oxley Act applicable to counsel for publicly held companies. References to other rules have also been corrected to correspond to the current rules rather than the current model rules, and for clarification to refer to Rule 8.3. Otherwise, proposed Comment 6 corresponds to Model Comment 6.

Proposed Comment 7 is new and corresponds to Model Comment 7 which relates to paragraph (d) of the proposed rule.

Proposed Comment 8 is new and except for the final sentence corresponds to Model Comment 8. The final sentence was included to make it clear that a discharged lawyer may disclose what he or she believes to be the reason for his or her discharge to the highest authority in the corporation. Since such a disclosure does not involve the disclosure outside the corporation of confidential information, such a disclosure is not limited by any other rules, but where the lawyer is making the highest authority in the corporation aware of his or her discharge, the comment makes it clear that the lawyer may also explain what he or she believes to be the basis for the discharge.

Proposed Comment 9 is revised to correspond to Model Comment 9, with a correction to the cross reference to the relevant paragraph of the Scope. The changes are stylistic.

Proposed Comments 10 through 14 are the current Comments 7 through 11, with the only change being the reference to the changed paragraph numbering in the rule in Comment 12. These comments correspond to Model Comments 10 through 14.

BOS111 12157005.2